Maina & another v Esiromo (Civil Appeal E493 of 2021) [2022] KEHC 16807 (KLR) (Civ) (22 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16807 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E493 OF 2021

CW MEOLI, J

DECEMBER 22, 2022

BETWEEN

JOHN GITHINJI MAINA .... 1ST APPLICANT

BODIC MWANIKI OGEGA .... 2ND APPLICANT

AND

MAUREEN MALELE ESIROMO .... RESPONDENT

RULING

1. The motion dated August 13, 2021 by John Githinji Maina and Bodic Mwaniki Ogega (hereafter the 1st and 2nd applicant/applicants) seeks among to stay execution of the judgment delivered in Nairobi Milimani CMCC No 903 of 2020 in favour of Maureen Malale Esiromo (hereafter the respondent) pending hearing and determination of the appeal. The motion is expressed to be brought under order 42 rules 6 and order 51 rule 1 of the *Civil Procedure Rules*, *inter alia*, on grounds on the face of the motion as amplified in the supporting affidavit sworn by 2nd applicant, who claims to be duly authorized by the 1st applicant to swear the affidavit.

2. To the effect that being aggrieved with the whole judgment of the lower court delivered on July 16, 2021, the applicants have preferred an appeal which is meritorious, arguable and raises pertinent points of law with a high probability of success. That if the stay order sought is not granted the applicants shall suffer irreparable loss and damage and that the respondent's means are unknown hence the apprehension that if the decretal sum were to be paid out and the appeal succeeds, it would be rendered nugatory. In conclusion the deponent expresses the applicants' willingness to furnish reasonable security as a condition for the grant of stay of execution.

3. The motion is opposed through the replying affidavit deposed by the respondent. She takes particular issue with the motion on grounds that the same is an afterthought, procured in bad faith for purposes

of denying her the fruits of judgment. The respondent contends that the appeal lacks merit and that the applicants have not demonstrated the loss they stand to suffer if stay of execution is not be granted; that the court ought to dismiss the motion to allow execution to issue ; and in the alternative if the court is inclined to allow the motion, it should require the applicants to provide security for due performance of the decree.

4. The motion was canvassed by way of written submissions. Regarding the applicable principles, the applicants anchored their submissions on the provisions of order 42 rule 6 of the *Civil Procedure Rules* as restated in the decision in *Kapa Oil Refineries Limited v Festus Mutuku & anor* [2018] eKLR. Submitting on the question of substantial loss, counsel relied on the decisions in *Zillion Farm Limited & anor v Josephine Mukai & another* Misc App No 687 of 2019 and the *County Government of Meru v Isaya Mugambi M'Muketha* Civil Application No 109 of 2019 to argue that the applicants stand to suffer substantial loss and damage if the respondent executes the decree of the lower court, which event would render the appeal nugatory. He highlighted the applicants' compliance with the court's interim orders of deposit issued on August 18, 2021 and the apprehension that if a portion of the decretal sum is released to the respondent, who has not demonstrated her financial capability, she may be unable to refund the same upon a successful appeal. In conclusion it was reiterated that the applicants have an arguable appeal that is meritorious thus the motion ought to be allowed as prayed.

5. On behalf of the respondent, similarly citing the applicable principles under the provisions of order 42 rule 6 (2) of the *Civil Procedure Rules* counsel submitted that the relief sought herein is discretionary and the discretion must be exercised judicially, meaning upon defined principles of law and not capriciously or whimsically. Citing the decision in Civil Appeal No E121 of 2021 *Shoko Molu Beka & another v Augustine Gwaro Mokamba*, counsel argued that substantial loss is a factual issue which must be raised in the supporting affidavit and that the applicants have failed to depose thereon. Urging the requirement for provision of security counsel cited the decision in *Edward Kamau & another v Hannah Mukui Gichuki* Misc 78 of 2015 to assert that the respondent is entitled to equal treatment before the law. Counsel concluded by asserting that the court ought to find a balance between the rights of both parties particularly the respondent who has a lawful judgment. He asserted that the motion is an abuse of the court process and ought to be dismissed with costs.

6. The court has considered the material canvassed in respect of the motion. First, it is pertinent to state that at this stage, the court is not concerned with the merits of the appeal. It is trite that the power of the court to grant stay of execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See *Butt v Rent Restriction Tribunal* [1982] KLR 417

7. The applicants prayer for stay of execution pending appeal, is brought under order 42 rule 6 of the *Civil Procedure Rules* which provides that:

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
>
> (2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant".

8. The cornerstone consideration in the exercise of the discretion is whether the applicants have demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of *Kenya Shell Ltd v Kibiru & another* [1986] KLR 410. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the *Shel*l case are especially pertinent. These are that:

> " 1. .....
>
> 2. In considering an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
>
> 3. In applications for stay, the court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
>
> 4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid."

9. The decision of Platt Ag JA, in the *Shell* case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Platt Ag JA (as he then was) stated *inter alia* that:

> "The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages…It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in order xli rule 4 (now order 42 rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts… (emphasis added)"

10. The learned judge continued to observe that: -

> "It is usually a good rule to see if order xli rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money." (Emphasis added)

11. Earlier on, Hancox JA in his ruling observed that

> “It is true to say that in consideration [*sic*] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,... render the appeal nugatory. This is shown by the following passage of Cotton L J in Wilson v Church (No 2) [1879] 12ChD 454 at page 458 where he said:-
>
> “I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”
>
> As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

12. The applicants affidavit material asserts that if the stay order sought is not granted applicants shall suffer irreparable loss and damage as the respondent’s means are unknown thus there is an apprehension that any decretal sum paid out and may not be recovered upon the appeal succeeding, which event would be rendered nugatory. The respondent failed and or opted not to counter the foregoing assertion. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike and another* [2006] eKLR the Court of Appeal stated that:

> “This court has said before and it would bear repeating that while the legal duty is on an applicants to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such applicants to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, chapter 80 laws of Kenya.”

13. The applicants have made out the case of apprehension concerning the respondent ‘s capacity to reimburse the decretal sum if paid out upon their successful appeal. The judgment of the lower court was for a sum of Kshs 2,305,650/- with costs & interest. This is a substantial sum as rightly asserted by the applicants. Upon the applicants expressing apprehension about the respondent’s capacity to repay, the burden shifted on her to controvert the assertion by proving her own means. She has not tendered evidence of her means; her bald depositions that the applicants have nor demonstrated the loss they are likely to suffer does not amount to much. In the scenario, it seems likely that the applicants stands to suffer substantial loss and the appeal rendered nugatory if stay is not granted. As stated in the *Shell* case, substantial loss in its various forms, is the cornerstone of the court’s jurisdiction for granting stay, and what has to be prevented.

14. Concerning security the applicants expressed willingness to furnish reasonable security if so directed as a condition for grant of stay of execution pending appeal. On August 14, 2021 this court upon considering exparte the applicants’ motion ordered the applicants to deposit Kshs 500,000/- as conditional stay pending hearing of the instant motion interpartes. A review of the court record evidences the applicants having complied with the said order by depositing the foregoing sums into court.

15. As rightly observed by the respondent, at this stage, the court must balance the competing interests of the parties so as not to prejudice the matter pending appeal. The words stated in Nduhiu Gitahi &

another v Anna Wambui Warugongo [1988] 2 KAR, citing the decision of Sir John Donaldson MR in *Rosengrens v Safe Deposit Centres Limited* [1984] 3 All ER 198 and others, are apt:

> " We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the defendant while giving no legitimate advantage to the plaintiff......
>
> It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal......"

16. It is true that the interim order issued by this court on August 14, 2021 was not the final determination of the application, and the compliance by the applicants though a relevant fact does not determine the security amount at this stage. All considered, the court is persuaded of the merits of the motion and will allow it on condition that the applicants shall deposit the entire decretal sum into a joint interest earning account within 30 days of today's date. The sums already deposited in court by the applicants are to be released to the depositor for purposes of compliance with the orders for deposit into a joint interest earning account. Costs will abide the outcome of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 22ND DAY OF DECEMBER 2022.

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Mr. Onagwa h/b for Mr. Opiyo

For the Respondent: Mr. Odhiambo h/b for M. Mbiti

C/A: Adika